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No. 85-.....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PRUDENTIAL FEDERAL SAVINGS
& LOAN ASSOCIATION,
Petitioner,

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in a case involving the wrongful termination of an employee brought under the Age Discrimination and Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, the district court must instruct on the shifting burdens of proof set forth in *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973) in the absence of direct proof of discrimination.

2. Whether pursuant to *Trans World Airlines, Inc. v. Thurston,* _____U.S. _____, 105 S.Ct. 613 (1985) liquidated damages for a "willful" violation of the ADEA can be awarded in the absence of proof that an employer should have known that its conduct violated the ADEA.

3. Whether an award of liquidated damages under the ADEA is available where the employer shows that the act or omission giving rise to the violation was taken reasonably and in good faith.

4. Whether an award of future damages in lieu of reinstatement is improper under the ADEA.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Prudential Federal Savings & Loan Association[1] (Prudential), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit on remand which was entered in this proceeding on May 28, 1985. On January 14, 1985, this Court granted Prudential's first Petition for a Writ of Certiorari and remanded

[1]Prudential Federal Savings & Loan Association is an association chartered under the laws of the United States of America and is a wholly owned subsidiary of Prudential Financial Services Corporation (PFSC), a Utah corporation.

this case to the Tenth Circuit for reconsideration in light of *Trans World Airlines, Inc. v. Thurston*, _____ U.S. _____, 105 S.Ct. 613 (1985) (*TWA v. Thurston*). *See Prudential Federal Savings & Loan Association v. EEOC*, _____ U.S. _____, 105 S.Ct. 896 (1985).

OPINIONS BELOW

The Opinion of the Court of Appeals on remand is reported at 763 F.2d 1166 (10th Cir. 1985). The original Opinion of the Court of Appeals which was vacated by this Court on January 14, 1985 is reported at 741 F.2d 1225 (10th Cir. 1984). No opinion was issued by the District Court for the District of Utah.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 28, 1985. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 29, Section 626(b)

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Pro-*

vided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

* * * *

2. United States Code, Title 29, Section 216(b)

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

* * * *

STATEMENT OF THE CASE

In the late 1970's, the savings and loan business entered a serious depression as a result of adverse economic conditions. In 1979, Prudential's management foresaw the impending economic downturn and chose to adopt stringent cost-cutting measures to maintain the company's viability. A Coordinating Committee was organized to study every facet of the company and recommend consolidation or elimination of all nonessential positions and personnel. Those recommendations resulted in a massive, on-going reduction in force. From 1979 to 1982,

the number of full-time employees was cut dramatically, declining from 203 to 84. T. at 849(18)-851(23).

In 1981, the Equal Employment Opportunity Commission (EEOC) brought this action against Prudential alleging that Prudential violated the ADEA when it discharged six employees and demoted a seventh. Jurisdiction of the district court was invoked under Section 626(b) of the ADEA and under 28 U.S.C. §§ 451, 1337, 1343 and 1345 (1982). After a week-long trial, the jury returned a verdict that Prudential had not discriminated with respect to six of the seven employees. The jury found Prudential liable under the ADEA to Douglas Tanner and determined that Tanner had been damaged in the amount of $34,200. However, the jury also determined that the termination of Tanner was not willful. The district court entered judgment in the amount of the verdict, and awarded Tanner an additional $17,000 for future damages "in lieu of reinstatement."

On its original appeal to the Tenth Circuit, Prudential argued that the district court erred in refusing to instruct the jury on the shifting burdens of proof under this Court's opinion in *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), and that the ADEA did not authorize an award of future damages to Tanner. The EEOC argued that the district court erred in instructing the jury on the applicable burden of proof for a willful violation of the ADEA.[2] The Court of Appeals rejected Prudential's arguments and affirmed the jury's verdict and the district court's award of future damages. The Court of Appeals also found that the district court had erred in instructing the jury on the applicable standard for finding a willful violation of the ADEA.

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[2]Prudential and the EEOC appealed the district court's judgment only insofar as it related to Tanner.

Prudential's Petition for a Writ of Certiorari was granted on January 14, 1985, the judgment of the Court of Appeals was vacated and this case was remanded to the Tenth Circuit for further consideration in light of *TWA v. Thurston. See Prudential Federal Savings & Loan Association v. EEOC,* _____ U.S. _____, 105 S.Ct. 896 (1985). A more detailed description of this case is contained in Prudential's original petition for certiorari.

On remand, the Tenth Circuit reaffirmed its opinion that the district court's refusal to give the *McDonnell Douglas* instruction on pretext and its award of future damages were correct under the ADEA. The Court of Appeals reversed its prior holding on willfulness, recognizing that *TWA v. Thurston* "specifically rejected" the Tenth Circuit's earlier formulation of the willfulness standard. The Court of Appeals went on to hold, however, that the district court's instruction on willfulness did not comport with *TWA v. Thurston* and remanded the issue for jury redetermination.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Incorrectly Construed the *McDonnell Douglas* Test by Failing to Instruct the Jury that the EEOC Had to Prove that Prudential's Explanation for Terminating Tanner Was a Pretext.

In the decision below, the Court of Appeals held that the district court was not required to instruct the jury that an ADEA plaintiff has the burden of proving that the employer's nondiscriminatory reasons for terminating the employee were pretextual. The Court of Appeals reasoned that a pretext instruction was unnecessary in an ADEA case since an ADEA plaintiff "need not prove that the

reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference." *Prudential Federal Savings & Loan Association v. EEOC,* 763 F.2d 1166, 1170 (10th Cir. 1985) (hereinafter *Prudential*).

The Court of Appeal's opinion is directly contrary to this Court's opinion in *TWA v. Thurston* and the opinions of other circuits which have considered the issue. *See, e.g., TWA v. Thurston,* 105 S.Ct. at 622; *Tice v. Lampert Yards, Inc.,* 761 F.2d 1210, 1212-13 (7th Cir. 1985); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1017-18 & n.18 (1st Cir. 1979) (where principal evidence of discrimination is provable primarily in classic *McDonnell Douglas* terms, jury should be instructed on *plaintiff's* burden to prove pretext). The shifting burdens of proof set forth in *McDonnell Douglas* clearly apply to ADEA cases. *See TWA v. Thurston,* 105 S.Ct. at 622; *Tice v. Lampert Yards, Inc.,* 761 F.2d 1210, 1212-13 (7th Cir. 1985); *Golomb v. Prudential Insurance Company of America,* 688 F.2d 547, 551 (7th Cir. 1982); *Reeves v. General Foods Corp.,* 682 F.2d 515, 520 (5th Cir. 1982); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1017-18 & n.18 (1st Cir. 1979). Under the *McDonnell Douglas* test, once an employee has established a prima facie case of discrimination, the burden shifts to an employer to articulate, a nondiscriminatory explanation. Once the employer satisfies that burden, the employee can prevail only by showing that the explanation is pretextual. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-57, 101 S.Ct. 1089, 1094-96 (1981). In *TWA v. Thurston* the Court states that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination," 105 S.Ct. at 622, but clarifies that "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct

evidence.'" *Id.* (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)). This Court thus made clear that in the absence of direct evidence of discrimination, the *McDonnell Douglas* instruction on pretext must be given.

In this case the Court of Appeals failed to consider the direct evidence standard set forth in *TWA v. Thurston*. The Court of Appeals should have found that the district court erred because it neither gave a pretext instruction nor found direct evidence of discrimination as required by *McDonnell Douglas* and *TWA v. Thurston*. The Court of Appeals' position allows a court to discard the *McDonnell Douglas* test without finding direct evidence of discrimination and thereby mislead the jury into believing that an employer has the burden of not only articulating but of proving a nondiscriminatory explanation for its discharge of an employee. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1094 (1981) ("defendant need not pursuade the court that it was actually motivated by proffered reasons"). The Court of Appeals' holding that the jury need not be instructed on the pretext prong of the *McDonnell Douglas* test was clearly prejudicial to the substantial rights of Prudential and requires reversal of the decisions below. This Court should grant certiorari to resolve the conflict in the circuits on this issue.

II.

TWA v. Thurston Precludes as a Matter of Law an Award of Liquidated Damages for a "Willful" Violation of the ADEA Where the Jury Finds that an Employer Should Not Have Known that its Actions Were Taken in Violation of the ADEA.

The ADEA authorizes an award of liquidated damages for violations of its provisions "only in cases of willful violations . . ." 29 U.S.C. § 626(b) (1982). In *TWA v. Thurston*, this Court held that "willfulness" under the ADEA must be predicated on a finding that the employer " 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *TWA v. Thurston*, 105 S.Ct. at 625-26 (quoting *Trans World Airlines, Inc. v. Thurston*, 713 F.2d 940, 956 (2d Cir. 1983)). After consideration of the *TWA v. Thurston* standard, the Tenth Circuit found the district court's jury instruction of willfulness to be incorrect and remanded this case to the district court to determine whether Prudential's actions in this case were "willful." *See Prudential*, 763 F.2d at 1174-75. The Court of Appeal's failure to rule as a matter of law that the instruction given by the district court fully comports with the definition of "willful" articulated in *TWA v. Thurston* was clear error and greatly undermines congressional intent behind the ADEA as interpreted in *TWA v. Thurston*.

In *TWA v. Thurston*, this Court made clear that an employer in an ADEA case acts "willfully" only when it "knew or showed reckless disregard" as to whether its conduct violated the ADEA. An employer acts with "reckle s disregard" only when it " 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law,' " 105 S.Ct. at 624 (quoting *Nabob Oil*

Co. v. United States, 190 F.2d 478, 479 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951)), or "purposely and deliberately evades the Act and fails to do what he knows he ought to do under the Act." *Darby v. United States*, 132 F.2d 928, 930 (5th Cir. 1943) (cited with approval in *TWA v. Thurston*, 105 S.Ct. at 624). A violation is not willful if the employer "had some reasonable basis for failing to comply, or some reasonable ground to think he was not required to do certain things and did not do them because he did not know he was supposed to do them . . . ." *Id.*

The instruction given by the district court in this case more than encompasses the purpose and thrust of the ADEA as interpreted in *TWA v. Thurston*. The district court instructed that liquidated damages could be awarded only if " 'Prudential knew, or should have known that at the time it decided to discharge or reassign the complaining employees, that such decisions and actions were in violation of the law and were intentionally and knowingly done in violation thereof.' " *Prudential*, 763 F.2d at 1174. While the words used by the district court in instructing the jury are not identical to the charge approved in *TWA v. Thurston*,[3] the instruction given allowed the jury to find that Prudential's actions were "willful" if Prudential "should have known" that its actions violated the ADEA and "should have known" that its actions were done "intentionally or knowingly" in violation of the ADEA. The district court's instruction that a violation is willful if Prudential *should have known* that its actions were unlawful is a much lesser standard

[3]The definition of willfulness approved in *TWA v. Thurston* was described as "an acceptable way to articulate a definition of 'willful'," 105 S.Ct. at 626, clearly implying that it was not the only acceptable way.

than the "reckless" standard articulated in *TWA v. Thurston*. Moreover, the "*should have known*" instruction allowed the jury to award liquidated damages if it found that Prudential acted recklessly since a finding that Prudential's actions were reckless necessarily would require a finding that Prudential should have known that its actions were unlawful. *See TWA v. Thurston*, 105 S.Ct. at 625-26; *Haskell v. Kaman Corp.*, 743 F.2d 113, 122-23 (2d Cir. 1984) (violation "reckless" only where employer *aware* that its conduct is governed by ADEA and fails to investigate the matter further); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 & n.12 (3d Cir. 1980).

Not only is the district court's instruction in this case entirely consistent with the reckless disregard standard articulated in *TWA v. Thurston*, but there is no factual basis in the record for the jury to conclude that Prudential " 'wholly disregard[ed] the law . . . without making any reasonable effort' to determine" whether the termination of Tanner as part of its reduction in force constituted a violation of the ADEA. *See TWA v. Thurston*, 105 S.Ct. at 624.

Undisputed testimony demonstrated that Prudential's Board of Directors was aware of the ADEA and specifically discussed its impact on Prudential's employees. T. at 712(23)-715(20); 648(11)-649(19); 721(25)-724(15); 766(15)-767(7). The Board of Directors took specific steps to investigate the ADEA and to determine whether Prudential's actions in the reduction in force would constitute violations of the ADEA. For example, Gene Donovan, President of Prudential, testified that after changes in the age laws had been brought to the Board's attention, he requested Prudential's Personnel Director "to investigate more fully what the nature of that statutory change was so that we could advise our management as how to . . .

remain in compliance." T. at 767(3-7). The Personnel Director investigated the changes in the age law and reported back to the Board concerning it. *Id.* As a result, Prudential's managers were again instructed that "they should be aware of . . . [the ADEA] so that they could be fully compliant with the Act," T. at 777(22)-778(9), and that employee appraisals were to be conducted "with respect to all employees irrespective of their age," and in "a fair, accurate, and consistent manner so that Prudential had the basis for determining employee's performance throughout their entire career to and inclusive of the last day." T. at 768(13)-769(1). In addition, to assure that employee evaluations used in the reduction in force were fairly and accurately compiled, Prudential adopted the practice of focusing on positions and activities which could be eliminated or handled more efficiently by other positions instead of looking at individuals. T. at 902(7-14). It was only after the position and activity had been analyzed that the individual performing the job was considered. *Id.*

To allow the recovery of liquidated damages in the face of such uncontroverted testimony would be tantamount to holding that whenever there has been a violation of the ADEA no additional evidence is necessary to support a finding of "willful" violation, a result directly contrary to congressional intent to allow liquidated damages only for the most egregious violations of the ADEA. *See TWA v. Thurston*, 105 S.Ct. at 624-25; *Spanier v. Morrison's Management Services*, Civ. A. No. C484-PT-1144-S (N.D. Ala. June 12, 1985) (available August 13, 1985, on Westlaw, F.S. file).[4]

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[4]This is not to say that evidence of liability and willfulness are not interrelated. Indeed a proper and fair determination of willfulness must necessarily be based on the same jury finding that there was an

Based on the foregoing undisputed testimony and the jury's finding grounded on an instruction consistent with *TWA v. Thurston*, it is apparent that the Court of Appeals should have ruled as a matter of law that Prudential did not act in reckless disregard of the ADEA, but made a reasonable investigation of the applicability of the ADEA to its reduction in force and took reasonable steps to assure that the reduction in force did not violate the ADEA.

III.

Liquidated Damages Under the ADEA Are Not Recoverable in this Case Because Prudential Acted Reasonably and in Good Faith.

In *TWA v. Thurston*, this Court reasoned that liquidated damages are unavailable for ADEA purposes if the employer "acted reasonably and in good faith in attempting to determine whether . . . [its] plan would violate the ADEA." 105 S.Ct. at 625-26 & n.22. The Tenth Circuit recognized the availability of a good faith defense in ADEA cases, *Prudential*, 763 F.2d at 1174, but held that the record did not contain sufficient facts to demonstrate Prudential's good faith in terminating Tanner. *Id.* at 1175. A thorough examination of the record, however, clearly demonstrates that the Court of Appeals imposed too great of a burden of proof for good faith under the standards articulated in *TWA v. Thurston*. This Court should grant certiorari to review the standards surrounding the good faith defense to liquidated damages and to review whether it was proper for the Court of Appeals to

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intentional violation of the ADEA based on complete development of the facts and circumstances of the case. *See Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F.Supp. 962, 967 n.1 (E.D. Pa. 1985).

remand the issue of Prudential's good faith to the district court.

The Court in *TWA v. Thurston* held that TWA "acted reasonably and in good faith" when it investigated whether its mandatory retirement policy violated the ADEA and took action to ensure that a change in that policy would keep TWA in compliance with the ADEA. *TWA v. Thurston*, 105 S.Ct. at 626. The record in this case, like that in *TWA v. Thurston*, shows without contrary evidence that Prudential took reasonable steps to acquaint itself with the provisions of the ADEA and the potential consequences of its scheduled reduction in force. Faced with serious economic upheavals in the savings and loan industry, T. at 574(23)-577(5), Prudential began a reorganization of its operations and a reduction in its work force to remain viable and competitive in the decreasing savings and loan market. T. at 605(13-23). Prudential organized a Coordinating Committee to fairly and consistently recommend consolidation or elimination of all nonessential positions without regard to particular employees. T. at 507(17)-508(12); 578(3)-579(25); 631(10)-632(3). The Coordinating Committee's analysis of the company necessarily relied upon the experience and recommendations of Prudential's managers. T. at 580(4)-581(12); 752(3-21). Managers were instructed on the requirements of the ADEA and directed to maintain compliance with the Act. T. at 777(22)-778(9). In addition, managers were instructed to fairly evaluate all positions and employees and to make certain that age was not one of the considered factors. T. at 584(20); 768(13)-769(1). There is no evidence that Prudential was ever advised that its policies would discriminate against employees on the basis of age.

As a result of the managers' analyses and recommendations, business judgments were made by Prudential to eliminate certain positions. Tanner's position was one of those positions found to be unnecessary since it was a "specialty" position which could be performed effectively by other positions. T. at 580(4)-582(19); 636(4)-638(11). Prior to the recommendation to eliminate Tanner's position, Tanner's immediate supervisors were instructed on the requirements of the age discrimination laws and that they should be "very honest with people in their appraisals, *regardless of their age.*" T. at 585(19-20). Tanner's supervisor testified that age was never a reason or factor considered by him in evaluating Tanner's position or in recommending the elimination of Tanner's position. He also testified that age was never mentioned in any manner by anyone to him as a reason for elimination of Tanner's position. T. at 583(18-23). The manager who recommended to the Coordinating Committee that Tanner's position be eliminated also testified that age was never a reason for the recommendation and that age was never mentioned to him by anyone as a reason to eliminate Tanner's position. T. at 638(22)-639(5).

It is therefore very clear under the uncontroverted facts that Prudential specifically discussed and acquainted itself with the ADEA prior to the discharge of Tanner and considered what impact the reduction of force would have on older employees. Prudential's reduction in force was part of an overall attempt to mitigate the harmful effects on Prudential of the recessionary period in the savings and loan industry. Prudential took reasonable steps to investigate the applicability of the ADEA to its reduction of force and to assure that evaluations were conducted and recommendations made without consideration of the age of the employee. Moreover, Prudential believed its actions were in accord with the ADEA's

provisions. Thus, much like *TWA v. Thurston*, "[i]t is reasonable to believe that the parties involved, in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan." *TWA v. Thurston*, 105 S.Ct. at 626. *See Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (liquidated damages unavailable where employer in good faith believes it is in compliance with ADEA).

Accordingly, this Court should grant certiorari to clarify the standards surrounding the good faith defense set forth in *TWA v. Thurston* and to clarify that those standards do not require Prudential to adduce further proof of the reasonableness and good faith of its conduct in terminating Tanner.

IV.

The Circuits Are in Conflict as to Whether Damages for Future Economic Loss Are Available Under the ADEA.

In its original petition to this Court, Prudential argued that an award of damages to an employee for assumed future economic losses was not authorized by the ADEA. This Court's order of remand directed the Tenth Circuit to reconsider its holding on future damages in light of *TWA v. Thurston*. *See Prudential Federal Savings & Loan Association v. EEOC*, _____ U.S. _____, 105 S.Ct. 896 (1985). The Tenth Circuit's opinion on remand reaffirmed without modification its earlier holding that future damages were available under the ADEA. *See Prudential*, 763 F.2d at 1172-73. For the reasons set forth in Prudential's original petition to this Court, the Tenth Circuit's holding on future damages is directly contrary to the position of the First Circuit and the purpose and language of the ADEA. The salient portions of Prudential's argument

against future damages are set forth here for the Court's convenience.

The judgment entered by the trial court gave Tanner, in addition to the $34,200 awarded by the jury, an additional sum of $17,000 "as lost retirement and pension benefits accruing through normal retirement, in lieu of reinstatement." On remand, the Tenth Circuit rejected Prudential's argument that an award of future damages is not authorized by the ADEA and that even if such damages could be awarded, they were improper in this case because Tanner did not sincerely desire reinstatement.

In reaching its holding, the Tenth Circuit acknowledged that its ruling was in conflict with the position of the First Circuit. *Prudential,* 763 F.2d at 1172. *See Kolb v. Goldring, Inc.,* 694 F.2d 869, 874 n.4 (1st Cir. 1982) (future economic losses not recoverable under the ADEA). The Tenth Circuit rejected the First Circuit's position, however, subscribing to the position of the Eighth and Ninth Circuits which also approve future damages. *Prudential,* 763 F.2d at 1172. *See Gibson v. Mohawk Rubber Co.,* 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier v. Federated Department Stores,* 672 F.2d 1312, 1319 (9th Cir.), *cert. denied,* 459 U.S. 859 (1982). The position taken by the Eighth, Ninth and now Tenth Circuits, however, is not supported by the language or the purpose of the ADEA. This Court should grant certiorari to affirm the First Circuit position and resolve the conflict among the circuits.

This Court's holding in *TWA v. Thurston* reflects the view that monetary awards in an ADEA case must be consistent with the overall congressional scheme to eradicate age discrimination in employment. *See TWA v. Thurston,* 105 S.Ct. at 625 ("We decline to interpret the liquidated damages provision of ADEA § 7(b) in a man-

ner that frustrates . . . [congressional] intent.") The language of the ADEA demonstrates that Congress intended to selectively incorporate specific remedies for a violation of ADEA provisions. *Id.* at 624; *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S.Ct. 866, 870 (1978). The remedial provisions of the ADEA define the types of monetary relief available to an ADEA plaintiff:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . *Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title* . . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b) (1982) (emphasis added). Thus, to determine the "[a]mounts owing to a person" as a result of a violation of the ADEA, a court must examine "the powers, remedies, and procedures provided in sections 211(b), 216 (except subsection (a) thereof), and 217" of the Fair Labor Standards Act (FLSA).[5]

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[5]Section 211(b) deals with the use of state government personnel to enforce the ADEA and § 217 grants jurisdiction to district courts to enforce ADEA provisions. Neither of these sections are germane to the issues here presented.

Section 216(b) of the FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected *in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.*

Id. § 216(b) (1982) (emphasis added). Nothing in the language of the FLSA authorizes awards of future economic loss; awards of damages are limited to those specified in the FLSA. *See Martinez v. Behrings Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959). Similarly, the type of relief available under the ADEA is limited to that which is available under the FLSA. *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 686-88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978). *See Ginsberg v. Burlington Industries, Inc.*, 500 F. Supp. 696, 700-01 (S.D.N.Y. 1980) (damages for ADEA violations are no broader than FLSA remedies). The First Circuit has expressly held that "damages [for ADEA purposes] are 'settled' on the date of judgment and the plaintiff cannot then recover damages for future economic loss or 'front pay.' " *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982). *See, also Foit v. Suburban Bancorp*, 549 F. Supp. 264, 267 (D. Md. 1982) (ADEA does not permit recovery of anticipated loss of future earnings); *Bleakley v. Jekyll Island-State Park Authority*, 536 F. Supp. 236, 244-45 (S.D. Ga. 1982); *Jaffee v. Plough Broadcasting Co.*, 19 Fair Empl. Prac. Cas. (BNA) ¶ 9062 (D. Md. 1979); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231

(N.D. Ga. 1971). *Cf. Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) (denying recovery under the ADEA for pain and suffering and punitive damages); *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (denying ADEA recovery for pain and suffering).

The Tenth Circuit entirely misses the point when it reasons that the inherent uncertainty of future damages should be placed on the employer found to be in violation of the ADEA. Such a policy determination is one properly left to Congress. Congress limited the legal remedies available under the ADEA to unpaid minimum wages and unpaid overtime compensation. *See* 29 U.S.C. § 626(b) (1982). Furthermore, in recognition of the inherent uncertainty and speculation surrounding future economic losses, Congress expressly provided for recovery of liquidated damages for willful violations which produce losses too obscure and difficult to measure. *Id. See* H. R. Conf. Rep. 950 on Age Discrimination in Employment Act Amendments of 1978, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504, 535; *Blim v. Western Electric Co.*, 731 F.2d 1473, 1481 (10th Cir.) (Seth, C.J., concurring and dissenting), *cert. denied*, 105 S.Ct. 233 (1984); *Prudential*, 763 F.2d at 1175 (Barrett, J., dissenting in part).

Those circuits which allow the recovery of future economic losses under the ADEA do so by virtue of ADEA language giving "the court . . . jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA] . . ." 29 U.S.C. § 626(b) (1982). However, the use of the equitable powers of a court to award damages for assumed future economic loss is not supported by the language of the ADEA which

limits the legal remedies available under the ADEA to "unpaid minimum wages or unpaid overtime compensation." *See Lorillard v. Pons*, 434 U.S. 575, 583 n.11, 98 S.Ct. 866, 871 n.11 (1978). The exercise of a court's equitable power to award future damages undermines the intent of Congress to limit the types of legal damages recoverable. While the equitable power of the court should be used to afford complete relief to an injured party in light of the objectives of the statutory scheme, "such equitable powers cannot be used to expand or override the limited legal remedies available under the ADEA." *Blim v. Western Electric Co.*, 731 F.2d 1473, 1481 (10th Cir.) (Seth, C.J., concurring and dissenting), *cert. denied*, 105 S.Ct. 233 (1984). "The court should not use its equitable powers to frustrate the intent of the statute." *Id.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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No. 85-.....

In The Supreme Court
OF THE
United States

October Term, 1985

PRUDENTIAL FEDERAL SAVINGS
& LOAN ASSOCIATION,
Petitioner,

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 85-.....

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PRUDENTIAL FEDERAL SAVINGS
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VS.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

741 F.2d 1225

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE,

VS.

PRUDENTIAL FEDERAL SAVINGS
AND LOAN ASSOCIATION,
DEFENDANT-APPELLANT.

Nos. 82-2444, 83-1073.

United States Court of Appeals,
Tenth Circuit.

Aug. 7, 1984.

Before BARRETT, DOYLE, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) brought this action against Prudential Federal Savings and Loan (Prudential) alleging that Prudential violated the Age Discrimination in Employment Act (ADEA or the Act), 29 U.S.C. §§ 621 *et seq.* (1982), when it discharged six employees and demoted a seventh. The case was tried to a jury, which found that one employee, Douglas Tanner, had been illegally terminated because of his age and awarded him $34,200 in past lost wages and benefits[1] The jury found that the violation had not been willful and accordingly did not award liquidated damages. As additional equitable relief, the trial judge granted Tanner $17,000 in lost future retirement and pension benefits in lieu of reinstatement.

Both parties have appealed. The EEOC contends that the district court erroneously instructed the jury on the meaning of "willful" as used in the section of the ADEA authorizing the award of liquidated damages for willful violations. In its cross-appeal Prudential asserts that: (1) the district court should have dismissed the action because the EEOC failed to conciliate as required by the ADEA; (2) the court erroneously failed to instruct the jury that the EEOC was required to prove pretext; (3) the evidence was insufficient to support the verdict in favor of Tanner; and (4) the court's award of future damages was erroneous. We affirm in part, reverse in part, and remand for further proceedings.

The facts giving rise to this litigation are briefly as follows. In the late 1970's economic conditions had an adverse impact on the operations of the savings and loan industry. In response, Prudential instituted a reduction in force designed to eliminate all non-essential positions

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[1]EEOC has not challenged these determinations on appeal.

and personnel. Douglas Tanner was one of several employees involuntarily terminated under the reduction in force. Tanner was fifty-four when he was discharged, and he had been with Prudential twenty-seven years. At the time of his termination he was an Acquired Property Manager, responsible for foreclosing on defaulted real estate loans and for managing and selling foreclosed properties. After his termination, two or three other employees performed his work along with their own duties. Prudential did not offer Tanner a position elsewhere in the company.

I

CONCILIATION

[1] Prudential vigorously argues on appeal that the EEOC failed to satisfy its statutory duty to conciliate in good faith and consequently the trial court erred in failing to dismiss the action on this ground. The ADEA states that "[b]efore instituting any action under this section, the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). This jurisdictional provision embodies "the congressional intent that enforcement be effected wherever possible without resorting to formal litigation." *Marshall v. Sun Oil Co.* 592 F.2d 563, 565 (10th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979) (*Sun Oil I*).

This court has recognized that the "ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Dartt v. Shell Oil Co.* 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd per curiam*

by an equally divided court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977). Accordingly, we have refused to dismiss cases where the EEOC failed to exhaust fully its duty to conciliate because to do so would severely hamper enforcement of the ADEA and would be "incompatible with the humanitarian nature of the Act." *Sun Oil I*, 592 F.2d at 566. We have concluded instead that when the EEOC initially makes a sufficient albeit limited effort to conciliate, the minimal jurisdictional requirement of the Act is satisfied and the action is therefore properly before the court. *Id.* Once this initial effort is made, "if the district court finds that further conciliation efforts are required the proper course is to stay proceedings until such informal conciliation can be concluded." *Id.*

Courts have recognized that "[b]ecause conciliation involves at least two parties, we must evaluate one party's efforts with an eye to the conduct of the other party." *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1335 (5th Cir. 1979) (*Sun Oil II*); *see also Marshall v. Hartford Fire Insurance Co.*, 78 F.R.D. 97, 103 (D.Conn.1978). Conciliation is thus a flexible and responsive process which necessarily differs from case to case. The EEOC may make a sufficient initial effort without undertaking exhaustive investigations or proving discrimination to the employer's satisfaction, *Sun Oil II*, 605 F.2d at 1334-35, so long as it makes a sincere and reasonable effort to negotiate by providing the defendant an "adequate opportunity to respond to all charges and negotiate possible settlements." *Hartford Fire Insurance Co.*, 78 F.R.D. at 107.

In this case the EEOC informed Prudential of the identity of the charging parties, the specific allegations of misconduct, and the remedy sought by each party, and on several occasions it invited conciliation. The record

reveals a series of overtures by the EEOC to which Prudential made no meaningful response. Prudential obviously was aware both that litigation could follow failure to conciliate and of the requirements of the Act. We conclude that the EEOC's initial effort was sufficient under *Sun Oil I,* 592 F.2d at 566-67, particularly in view of Prudential's insistent refusal to undertake any significant dialogue, its outright rejection of the EEOC's initial settlement proposals, and its refusal to offer any serious counterproposals. The trial court properly refused to dismiss the action because, under the circumstances, Prudential was given a reasonable opportunity before suit was filed to respond and negotiate.

In line with *Sun Oil I,* the court exercised its discretion to stay the suit forty-five days to provide the parties an additional opportunity to conduct conciliation. The conciliation proceedings were recorded at Prudential's insistence. The trial court found that the record of these talks was relevant to Prudential's claim that the EEOC had failed initially to negotiate in good faith because this record revealed the pre-filing conciliation in a new light. Based on Prudential's conduct at the recorded meeting, the court observed that the "manevering in the correspondence that was submitted by Prudential" regarding pretrial conciliation was misleading. Rec., supp. vol. I, at 19-20. The court noted "Prudential's almost intransigent resistance to any good faith negotiation and the efforts of the commission attorney to at least open the door for meaningful conciliation." *Id.* at 19. The court justifiably concluded that Prudential's conduct at this meeting was an accurate reflection of its attitude in the earlier conciliation, and held that Prudential was in no position to object to a lack of good faith conciliation by the EEOC. We agree with this conclusion.

II

THE PROPOSED PRETEXT INSTRUCTION

[2] Prudential requested the court to instruct the jury that if it found Prudential had offered reasonable factors other than age for the termination or demotion of the complaining employees, the jury had to find for Prudential unless it found that the EEOC had proven that Prudential's explanation for the termination or demotion was a pretext for age discrimination. The court refused "on the theory that even though the jury finds that the explanation of financial difficulties and the necessity for reorganization or other explanations were not mere pretext, if they also find that age discrimination was a determinative factor, the jury could not be peremptorily instructed to decide for the defendant." Rec., vol. VIII, at 956.

[3] In reviewing Prudential's allegation of error we must consider the instructions given as a whole. *McGrath v. Wallace Murray Corp.*, 496 F.2d 299, 301 (10th Cir. 1974). "[N]o particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 656 (10th Cir.1984); *see also Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1181 (6th Cir.1983).

In discussing the proper instructions in an ADEA action, we recently stated that

> "The essence of the correct formulation of the standard of proof is that it requires the jury to focus on the effect of the factor of age. The jury must understand that it is not enough that age discrimination figure in the decision to demote or discharge; age must 'make a difference' between termination

> and retention of the employee in the sense that, 'but for' the factor of age discrimination, the employee would not have been adversely affected."

Perrell, 726 at 656. In the instant case the jury was properly and thoroughly instructed that the EEOC had to prove that "the age of the employee in question was of determinative factor in defendant's decision to discharge him. That is . . . but for his age, he would not have been so treated." Rec., vol. XV, at 1111. We conclude that the court's instructions accurately set out the relevant legal standards.

[4] Moreover, we agree with the trial judge's reason for refusing Prudential's pretext instruction. An ADEA plaintiff is not requiring instruction. An ADEA plaintiff is not required to show that age was the sole motivating factor in the employment decision. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 82 (2d Cir.1983); *Blackwell*, 696 F.2d at 1181; *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1315-16 (9th Cir.), *cert. denied*, 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed.2d 113 (1982); *Smithers v. Bailar*, 629 F.2d 892, 898 (3rd Cir.1980). Thus a plaintiff need not prove that the reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference. *Hagelthorn*, 710 F.2d at 82; *see Perrell*, 726 F.2d at 656. The instruction requested by Prudential could have mislead the jury into thinking that even though if found age to be the determinative factor, it nonetheless would be required to return a verdict for Prudential unless the EEOC also proved that Prudential's reasons were invalid. Consequently, the trial court properly rejected it.

III

SUFFICIENCY OF THE EVIDENCE

[5] Prudential argues that the evidence was insufficient to support the jury verdict in favor of Tanner. A judgment notwithstanding the verdict is appropriate only when "the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir.1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, *id.*, and "cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury." *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 n. 2 (10th Cir.1981). "[S]ince the grant of such a motion deprives the non-moving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted." *Id.* at 680. Upon review of the record under the above standards, we conclude that a judgment notwithstanding the verdict is unwarranted.

When both parties have fully presented their evidence, the "central question is whether plantiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a determinative factor in the employer's decision." *Hagelthorn*, 710 F.2d at 81; *see also United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). In this case the EEOC offered statistical evidence of a significant association between age and discharge, as well as evidence of statements made by Prudential's president and other management personnel, which the jury reasonably could construe as suggesting that age played a determinative role in the company's selection of

employees for termination. In addition, the EEOC's evidence tended to prove that real estate foreclosure activity was substantial at this time due to the economic climate, and that several younger employees carried on Tanner's work after his departure. Although this evidence was not undisputed, it obviously was accepted by the jury and clearly is sufficient to allow a reasonable factfinder to decide that age was a determinative factor in Tanner's discharge.

IV
FUTURE DAMAGES

[6] In its entry of judgment on the jury verdict, the trial court awarded Tanner $17,000 "as lost retirement and pension benefits accruing through normal retirement, in lieu of reinstatement." Rec., vol. II, at 477. On appeal, Prudential contends that an award of future damages is not authorized by the ADEA, and that even if such damages could be awarded, they were improper in this case because Tanner did not sincerely request reinstatement.

The ADEA incorporates the remedies of the Fair Labor Standards Act (FLSA) as follows:

> "The provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the FLSA], and subsection (c) of this section. . . . *Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. . . .*"

29 U.S.C. § 626(b) (emphasis added). The FLSA provides the district courts with power to restrain violations

of the act. *Id.* § 217. The most pertinent provision, section 216(b), provides:

> "Any employer who violates the provisions of [the Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Id. § 216(b). However, the ADEA makes a significant addition to the FLSA remedies by providing that

> "In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."

Id. § 626(b) (emphasis added).

The courts disagree on whether future damages in lieu of reinstatement are available under the ADEA. *See, e.g., O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 574 F.Supp. 214, 216-19 (N.D.Ga.1982) (discussing cases); *Koyen v. Consolidated Edison Co.*, 560 F.Supp. 1161, 1167 & n. 33 (S.D.N.Y.1983) (citing cases). The Eighth and Ninth Circuits have held that such damages may be awarded under certain circumstances. *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir.1982); *Cancellier*, 672 F.2d at 1319. The First Circuit has stated that an ADEA plaintiff cannot recover damages for future economic loss. *See Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n. 4 (1st Cir.1982).

This court has recently reviewed a case in which the trial court had awarded future damages in lieu of reinstatement. *See Blim v. Western Electric Co.*, 731 F.2d 1473, 1478-79 (10th Cir.1984). We there recognized the split in the circuits on this issue, but a majority of the panel held that it did not need to resolve the question. *Id.* at 1479. Instead, the majority assumed without deciding that front pay is available under the ADEA, but held that under the circumstances of that case the trial court should have ordered repromotion rather than front pay. Chief Judge Seth, in dissent, would have decided the issue and would have held that front pay is not a remedy contemplated by the ADEA. *Id.* at 1481. We are directly faced with the question in this case.

Although the ADEA provides that violations of the Act generally are to be treated as violations of the Fair Labor Standards Act, the ADEA only selectively incorporates FLSA sections. At the same time, as we have pointed out, the ADEA contains additional remedial provisions not found in the FLSA. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978).

In a thorough and careful analysis of the question of damages in lieu of reinstatement, the court in *Koyen* concluded:

> "The manifest purpose of this broad grant of legal and equitable power is to enable the courts to fashion whatever remedy is required to fully compensate an employee for the economic injury sustained by him. The power so granted is sufficient to authorize an award of future loss of earnings in appropriate cases.

> To deny that authority would defeat a purpose of the Act to make a victim of discrimination 'whole' and to restore him to the economic position he would have occupied but for the unlawful conduct of his employer. To deny such authority would remove a deterrent force against future violations."

560 F.Supp. at 1168 (footnotes omitted). We agree. The power to grant equitable relief provided in the ADEA clearly stands in addition to the monetary relief available under the FLSA sections and is expressly stated to be without limitation. When we read this section as a whole and construe it liberally, as we must, *see Dartt,* 539 F.2d at 1260, we conclude that the legal and equitable remedies available under the ADEA are not limited either to those specifically listed or to those available under the FLSA, so long as the relief is "appropriate to effectuate the purposes of [the Act]." 29 U.S.C. § 626(b).

We held in *Blim* that reinstatement is the preferred remedy under the ADEA and should be ordered whenever it is appropriate. 731 F.2d at 1479; *see also Gibson,* 695 F.2d at 1101; *Cancellier,* 672 F.2d at 1319. Reinstatement may not be appropriate, however, when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible. *See, e.g., Dickerson v. Deluxe Check Printers, Inc.,* 703 F.2d 276, 281 (9th Cir.1983); *Cancellier,* 672 F.2d at 1319-20; *Whittlesey v. Union Carbide Corp.,* 567 F.Supp. 1320, 1330 (S.D.N.Y.1983); *Hoffman v. Nissan Motor Corp.,* 511 F.Supp. 352, 355 (D.N.H.1981). Under such circumstances, an award of future damages in lieu of reinstatement furthers the remedial purposes of the ADEA by assuring that the aggrieved party is returned as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct. *See*

Ventura v. Federal Life Insurance Co., 571 F.Supp. 48, 50 (N.D. Ill.1983). If this were not the case, an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return.[2] *See, e.g., Cancellier,* 672 F.2d at 1319-20.

[7] We recognize that future damages have been criticized as uncertain and speculative. *See, e.g., Foit v. Suburban Bancorp,* 549 F.Supp. 264, 267 (D.Md.1982). However, given our conclusion that they are available under the ADEA, "[t]he mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability. 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' " *Koyen,* 560 F.Supp. at 1169 (quoting *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946)). Courts are able to alleviate the uncertainty of future damages by taking into account a discharged employee's duty to mitigate, "the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards." *Id.* at 1168-69.

In any event, uncertainty is not a relevant consideration in this case because the court did not grant future wages. Tanner's pension had vested at the time of trial and the parties stipulated that the $17,000 in pension

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[2]A plaintiff need not "request reinstatement as a prerequisite to obtaining front pay where the evidence reveals an atmosphere of hostility." *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir.1980) (Title VII); *Koyen*, 560 F.Supp. at 1169.

benefits would provide Tanner the same pension upon retirement that he would have received had he not been illegally discharged.

In its memorandum supporting its proposed judgment and order filed below, the EEOC stated:

> "Front pay is requested in lieu of reinstatement in that the defendant has steadfastly refused to consider reinstatement as a remedy since the date of receipt of Mr. Tanner's charge of discrimination. It has been two and one-half (2½) years since Mr. Tanner's discharge and defendant's expressed hostile attitude toward its former employees, both during conciliation attempts and at trial, makes reinstatement a virtual impossibility as a remedy."

Rec., vol. II, at 452. The record contains evidence to support this contention.[3] However, the district judge did not state why future damages are more appropriate than reinstatement. The trial court must make this assessment in the first instance. Accordingly, we remand for the court to reconsider its award of future pension benefits in light of our decision in *Blim* and the analysis set forth above, and to articulate the evidence and rationale underlying its decision.

V

THE WILLFULNESS INSTRUCTION

The ADEA, 29 U.S.C. § 626(b), provides that amounts owing to a person as a result of a violation of the Act are deemed unpaid minimum wages or unpaid overtime compensation for purposes of section 216 of the FLSA. Under

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[3]Indeed, Prudential has not indicated on appeal that it would prefer reinstatement over the payment of pension benefits.

section 216, an employer who violates the FLSA is liable for these amounts plus "an additional equal amount as liquidated damages."[4] *Id.* § 216(b). However, the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." *Id.* § 626(b).

In this case the trial court instructed the jury that

> "A willful violation occurs when a person acts with specific intent to violate the law, where with knowledge of the law he proceeds, or it proceeds to violate the law knowingly and intentionally.
>
> "In other words, you can find willful discrimination for age, or willful violation of the law, only if you find both that Prudential violated the law by discharging or reassigning complaining employees because of their age, and that Prudential knew, or should have known at the time that it decided to discharge or reassign the complaining employees, that such decisions and actions were intentionally and knowingly done in violation thereof."

Rec., vol. XV, at 1121-22. On appeal the EEOC contends that this instruction erroneously imposed too strict a standard by requiring proof that the employer specifically intended to violate the law. We agree.

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[4]The ADEA authorizes the recovery of "liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses . . . that are 'too obscure and difficult of proof for estimate other than by liquidated damages. . . .' " H.R.Conf.Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S.Code Cong. & Ad. News 504, 528, 535 (quoting *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-84, 62 S.Ct. 1216, 1222-23, 86 L.Ed. 1682 (1942)). "[L]iquidated damages are in the nature of legal relief," *id.*, and "are not intended to take the place of equitable relief." *Dickerson*, 703 F.2d at 280.

[8, 9] This court has held that a violation of the ADEA is willful when the employer "acted in the face of the ADEA" and was "fully aware that the Act was 'in the picture.' " *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir.1980) (quoting *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972)). In so doing we have adopted the same definition of willfulness that we apply in determining whether a violation of the FLSA is willful for statute of limitation purposes. *See, e.g., id.; EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1273, 1274 (10th Cir.1983). Under this standard, "[a] violation may be willful *even if an employer does not have specific knowledge that his actions violate the Act* . . . . Instead, '[a] violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions.' " *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir.1983) (quoting *Central Kansas Medical Center,* 705 F.2d at 1274) (emphasis added). Accordingly, the instruction given by the court here was erroneous.[5]

[10] The record contains testimony by Prudential executives and members of the board demonstrating that the company in fact knew its employees were protected by the ADEA, and Prudential does not contend to the

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[5]Prudential argues that this issue is not properly before us because the EEOC did not propose to the trial court the instruction it now contends should have been given. Although the EEOC objected to the instruction given, the instruction it offered, while approved by several circuits, was not in the form articulated by this court. Even assuming that the EEOC failed properly to preserve the issue for appeal, however, we conclude that the instruction given constituted plain error affecting substantial rights. "[W]e will review instructions not properly objected to at trial where the error is plain and significant." *Fox v. Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir.1978).

contrary on appeal. Based on this uncontested evidence, we conclude as a matter of law that Purdential's conduct in terminating Tanner constituted a willful violation within the meaning of the ADEA. *Cf. Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 729-730 (10th Cir.1984).

[11] In so doing we address the question left undecided in *Mistretta*, 639 F.2d at 595 n. 4, and hold that the good faith defense of section 11 of the Portal-to-Portal Pay Act, 29 U.S.C. § 260, is not incorporated into the ADEA. This section, which applies to awards of liquidated damages under the FLSA, "grants courts authority to deny or limit liquidated damages where the 'employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith. . . .' " *Lorillard*, 434 U.S. at 581-82 n. 8, 98 S.Ct. at 870-71 n. 8 (quoting 29 U.S.C. § 260). As the Supreme Court pointedly has observed, although the ADEA expressly incorporated other provisions of the Portal-to-Portal Pay Act, "the ADEA does not make any reference to § 11." *Id.* We join those courts that have found this omission significant and conclude that the good faith provision of section 11 is not available in ADEA cases. *See, e.g., Hill v. Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir.1983); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir.1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 981-82 (9th Cir.1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 279 (3d Cir.1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir.1979).

[12, 13] Once a violation or the ADEA is determined to be willful, the award of liquidated damages is mandatory, and the court is without discretion "to award liquidated damages in an amount other than that equal to the award for compensatory damages." *Hill*, 708 F.2d at

238; *see also* H.R.Conf.Rep. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S.Code Cong. & Ad. News 528, 535 (ADEA provides liquidated damages calculated as amount equal to pecuniary loss to compensate for nonpecuniary losses arising from willful violation). Accordingly, plaintiff is entitled to liquidated damages in an amount equal to the $34,200 in pecuniary losses found by the jury.

The judgment is affirmed insofar as it awards plaintiff $34,200 in lost wages. It is reversed insofar as it fails to award liquidated damages, and the case is remanded with directions to enter judgment in the additional amount of $34,200. The judgment is also reversed insofar as it awards plaintiff $17,000 in future pension and retirement benefits, and the case is remanded for reconsideration of this relief in light of this opinion.

BARRETT, Circuit Judge, dissenting in part.

I agree with the dissent filed by Chief Judge Seth in *Blim v. Western Elect. Co., Inc.*, 731 F.2d 1473 (10th Cir.1984) that front pay is not a remedy contemplated by the ADEA. *See also, Kolb v. Goldring*, 694 F.2d 869 (1st Cir.1982).

Chief Judge Seth carefully reviewed the legislative history of ADEA and he concluded that "allowing front pay runs against the intent of Congress in limiting legal remedies to 'unpaid wages and unpaid overtime compensation.' The court should not use its equitable powers to frustrate the intent of the statute." 731 F.2d at 1481. Judge Seth set forth salutary reasons for the disallowance of front pay, after recognizing that liquidated damages may be recovered for willful violations:

> The front pay damages are too uncertain to be considered "lost wages" or "lost earned benefits."

> The possibilities of promotions. legitimate demotions, terminations, or death inject too many unknowns. In these circumstances the award of front pay is too speculative to be considered pecuniary damages under the statute. The enforcement section of the ADEA was specifically constructed to limit the type of available damages. As mentioned, although the statute grants broad equitable powers those powers cannot be used to expand the legal remedies specifically detailed in the statute. *Id.* at 1481.

In *Plyler v. Doe*, 457 U.S. 202, 242, 102 S.Ct. 2382, 2408, 72 L.Ed.2d 786 (1982) the Supreme Court observed that "[T]he Constitution does not constitute us [the Justices of the Supreme Court of the United States] as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' " In like manner the court should be ever cautious not to play the role of a superlegislature.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 14, 1985

Mr. Stephen G. Crockett
185 South State Street
Suite 1300
Salt Lake City, UT 84111

RE: PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION VS. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
No. 84-681

Dear Mr. Crockett:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Trans World Airlines, Inc. v. Thurston, 469 U.S. ____ (1985). Justice Powell took no part in the consideration or decision of this case.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

NOVEMBER TERM — JANUARY 16, 1985

Before: Honorable JAMES E. BARRETT, Honorable WILLIAM E. DOYLE and Honorable STEPHANIE K. SEYMOUR, Circuit Judges.

No. 82-2444
Equal Employment Opportunity Commission,
plaintiff-appellee,
vs.
Prudential Federal Savings and Loan Association,
plaintiff-appellant,

No. 83-1073
Equal Employment Opportunity Commission,
plaintiff-appellant,
vs.
Prudential Federal Savings and Loan Association,
defendant-appellee.

These matters come on for consideration of the judgment of the United States Supreme Court vacating the judgment of this Court entered August 7, 1984, and remanding the causes to this Court for further consideration in conformity with the Supreme Court opinion, Trans World Airlines, Inc. v. Thurston, 469 U.S. ____ (1985).

Upon consideration whereof, it is the order of this Court as follows:

1. The mandate issued to the United States District Court for the District of Utah on August 29, 1984, is recalled.

2. The judgment of this Court filed on August 7, 1984 is vacated.

Counsel will be notified if this Court deems that further briefing is desired prior to disposition of this cause on remand.

HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

JANUARY TERM — JANUARY 29, 1985

Before: Honorable JAMES E. BARRETT, Honorable WILLIAM E. DOYLE and Honorable STEPHANIE K. SEYMOUR, Circuit Judges.

NOS. 82-2444 AND 83-1073

Equal Employment Opportunity Commission,
Plaintiff-Appellee, Cross-Appellant,

vs.

Prudential Federal Savings and Loan Association,
Defendant-Appellant, Cross-Appellee.

This matter comes on for consideration of the judgment of the Supreme Court of the United States vacating the judgment of this Court entered August 7, 1984 and remanding the cause of this Court for further consideration in light of Trans World Airlines, Inc. v. Thurston, 469 U.S. ____ (1985).

Upon consideration whereof, it is ordered that the opinion of this Court, dated August 7, 1984, is withdrawn.

It is further ordered that the parties filed simultaneous briefs with their suggestions as to the effect of *Thurston* on the captioned appeal. The parties shall prepare their briefs in typewritten form. An original and seven copies of each brief shall be filed with the Clerk on or before *February 21, 1985.*

HOWARD K. PHILLIPS, Clerk

763 F.2D 1166

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
vs.
PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendant-Appellant.
NOS. 82-2444, 83-1073.

United States Court of Appeals,
Tenth Circuit.
May 28, 1985.

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) brought this action against Prudential Federal Savings and Loan (Prudential) alleging that Prudential violated the Age Discrimination in Employment Act (ADEA or the Act), 29 U.S.C. §§ 621 *et seq.* (1982), when it discharged six employees and demoted a seventh. The case was tried to a jury, which found that one employee, Douglas Tanner, had been illegally terminated because of his age and awarded him $34,200 in past lost wages and benefits.[1] The jury found that the violation had not been willful and accordingly did not award liquidated damages. As additional equitable relief, the trial judge granted Tanner $17,000 in lost future retirement and pension benefits in lieu of reinstatement. Both parties appealed. Our initial decision in this case was vacated by the Supreme Court and remanded for reconsideration in

[1]The jury found in favor of Prudential with respect to the six other charging parties. The EEOC has not challenged these determinations on appeal.

light of *Trans World Airlines v. Thurston*, ____ U.S. ____, 105 S.Ct. 613, 83 L.Ed.2d 523. See ____ U.S. ____, 105 S.CT. 896, 83 L.Ed.2d 913. *Thurston* is expressly considered in Part V *infra*.

The EEOC contends that the district court erroneously instructed the jury on the meaning of "willful" as used in the section of the ADEA authorizing the award of liquidated damages for willful violations. In its cross-appeal Prudential asserts that: (1) the district court should have dismissed the action because the EEOC failed to conciliate as required by the ADEA; (2) the court erroneously failed to instruct the jury that the EEOC was required to prove pretext; (3) the evidence was insufficient to support the verdict in favor of Tanner; and (4) the court's award of future damages was erroneous. We affirm in part, reverse in part, and remand for further proceedings.

The facts giving rise to this litigation are briefly as follows. In the late 1970's economic conditions had an adverse impact on the operations of the savings and loan industry. In response, Prudential instituted a reduction in force designed to eliminate all non-essential positions and personnel. Douglas Tanner was one of several employees involuntarily terminated under the reduction in force. Tanner was fifty-four when he was discharged, and he had been with Prudential twenty-seven years. At the time of his termination he was an Acquired Property Manager, responsible for foreclosing on defaulted real estate loans and for managing and selling foreclosed properties. After his termination, two or three other employees performed his work along with their own duties. Prudential did not offer Tanner a position elsewhere in the company.

I

CONCILIATION

Prudential vigorously argues on appeal that the EEOC failed to satisfy its statutory duty to conciliate in good faith and consequently the trial court erred in failing to dismiss the action on this ground. The ADEA states that "[b]efore instituting any action under this section, the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). This jurisdictional provision embodies "the congressional intent that enforcement be effected wherever possible without resorting to formal litigation." *Marshall v. Sun Oil Co.,* 592 F.2d 563, 565 (10th Cir.), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979) (*Sun Oil I*).

This court has recognized that the "ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Dartt v. Shell Oil Co.,* 539 F.2d 1256, 1260 (10th Cir.1976), *aff'd per curiam by an equally divided court,* 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977). Accordingly, we have refused to dismiss cases where the EEOC failed to exhaust fully its duty to conciliate because to do so would severely hamper enforcement of the ADEA and would be "incompatible with the humanitarian nature of the Act." *Sun Oil I,* 592 F.2d at 566. We have concluded instead that when the EEOC initially makes a sufficient albeit limited effort to conciliate, the minimal jurisdictional requirement of the Act is satisfied and the action is therefore properly before the court. *Id.* Once this initial effort is made, "if the district court finds that further conciliation efforts are

required the proper course is to stay proceedings until such informal conciliation can be concluded." *Id.*

[1] Courts have recognized that "[b]ecause conciliation involves at least two parties, we must evaluate one party's efforts with an eye to the conduct of the other party." *Marshall v. Sun Oil Co.,* 605 F.2d 1331, 1335 (5th Cir. 1979) (*Sun Oil II*); *see also Marhsall v. Hartford Fire Insurance Co.,* 78 F.R.D. 97, 103 (D.Conn.1978). Conciliation is thus a flexible and responsive process which necessarily differs from case to case. The EEOC may make a sufficient initial effort without undertaking exhaustive investigations or proving discrimination to the employer's satisfaction, *Sun Oil II,* 605 F.2d at 1334-35, so long as it makes a sincere and reasonable effort to negotiate by providing the defendant an "adequate opportunity to respond to all charges and negotiate possible settlements." *Hartford Fire Insurance Co.,* 78 F.R.D. at 107.

[2] In this case the EEOC informed Prudential of the identity of the charging parties, the specific allegations of misconduct, and the remedy sought by each party, and on several occasions it invited conciliation. The record reveals a series of overtures by the EEOC to which Prudential made no meaningful response. Prudential obviously was aware both that litigation could follow failure to conciliate and of the requirements of the Act. We conclude that the EEOC's initial effort was sufficient under *Sun Oil I,* 592 F.2d at 566-67, particularly in view of Prudential's insistent refusal to undertake any significant dialogue, its outright rejection of the EEOC's initial settlement proposals, and its refusal to offer any serious counterproposals. The trial court properly refused to dismiss the action because, under the circumstances,

Prudential was given a reasonable opportunity before suit was filed to respond and negotiate.

[3] In line with *Sun Oil I,* the court exercised its discretion to stay the suit forty-five days to provide the parties an additional opportunity to conduct conciliation. The conciliation proceedings were recorded at Prudential's insistence. The trial court found that the record of these talks was relevant to Prudential's claim that the EEOC had failed initially to negotiate in good faith because this record revealed the pre-filing conciliation in a new light. Based on Prudential's conduct at the recorded meeting, the court observed that the "maneuvering in the correspondence that was submitted by Prudential" regarding pre-trial conciliation was misleading. Rec., supp. vol. I, at 19-20. The court noted "Prudential's almost intransigent resistance to any good faith negotiation and the efforts of the Commission attorney to at least open the door for meaningful conciliation." *Id.* at 19. The court justifiably concluded that Prudential's conduct at this meeting was an accurate reflection of its attitude in the earlier conciliation, and held that Prudential was in no position to object to a lack of good faith conciliation by the EEOC. We agree with this conclusion.

II

THE PROPOSED PRETEXT INSTRUCTION

[4] Prudential requested the court to instruct the jury that if it found Prudential had offered reasonable factors other than age for the termination or demotion of the complaining employees, the jury had to find for Prudential unless it found that the EEOC had proven that Prudential's explanation for the termination or demotion was a pretext for age discrimination. The court refused

"on the theory that even though the jury finds that the explanation of financial difficulties and the necessity for reorganization or other explanations were not mere pretext, if they also find that age discrimination was a determinative factor, the jury could not be preemptorily instructed to decide for the defendant." Rec., vol. VIII, at 956.

In reviewing Prudential's allegation of error we must consider the instructions given as a whole. *McGrath v. Wallace Murray Corp.*, 496 F.2d 299, 301 (10th Cir.1974). "[N]o particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 656 (10th Cir.1984); *see also Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1181 (6th Cir.1983).

In discussing the proper instructions in an ADEA action, we recently stated that

> "The essence of the correct formulation of the standard of proof is that it requires the jury to focus on the effect of the factor of age. The jury must understand that it is not enough that age discrimination figure in the decision to demote or discharge; age must 'make a difference' between termination and retention of the employee in the sense that, 'but for' the factor of age discrimination, the employee would not have been adversely affected."

Perrell, 726 F.2d at 656. In the instant case the jury was properly and thoroughly instructed that the EEOC had to prove that "the age of the employee in question was a determinative factor in defendant's decision to discharge him. That is . . . but for his age, he would not have been so treated." Rec., vol. XV, at 1111. We conclude that the court's instructions accurately set out the relevant legal standards.

[5, 6] Moreover, we agree with the trial judge's reason for refusing Prudential's pretext instruction. An ADEA plaintiff is not required to show that age was the sole motivating factor in the employment decision. *Hagelthorn v. Kennecott Corp.,* 710 F.2d 76, 82 (2d Cir.1983); *Blackwell,* 696 F.2d at 1181; *Cancellier v. Federated Department Stores,* 672 F.2d 1312, 1315-16 (9th Cir.), *cert. denied,* 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed.2d 113 (1982); *Smithers v. Bailar,* 629 F.2d 892, 898 (3rd Cir.1980). Thus a plaintiff need not prove that the reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference. *Hagelthorn,* 710 F.2d at 82; *see Perrell,* 726 F.2d at 656. The instruction requested by Prudential could have misled the jury into thinking that even though it found age to be the determinative factor, it nonetheless would be required to return a verdict for Prudential unless the EEOC also proved that Prudential's reasons were invalid. Consequently, the trial court properly rejected it.

III

SUFFICIENCY OF THE EVIDENCE

[7] Prudential argues that the evidence was insufficient to support the jury verdict in favor or Tanner. A judgment notwithstanding the verdict is appropriate only when "the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Symons v. Mueller Co.,* 493 F.2d 972, 976 (10th Cir.1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, *id.,* and "cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that

of the jury." *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 n. 2 (10th Cir.1981). "[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted." *Id.* at 680. Upon review of the record under the above standards, we conclude that a judgment notwithstanding the verdict is unwarranted.

When both parties have fully presented their evidence, the "central question is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a determinative factor in the employer's decision." *Hagelthorn*, 710 F.2d at 81; *see also United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). In this case the EEOC offered statistical evidence of a significant association between age and discharge, as well as evidence of statements made by Prudential's president and other management personnel, which the jury reasonably could construe as suggesting that age played a determinative role in the company's selection of employees for termination. In addition, the EEOC's evidence tended to prove that real estate foreclosure activity was substantial at this time due to the economic climate, and that several younger employees carried on Tanner's work after his departure. Although this evidence was not undisputed, it obviously was accepted by the jury and clearly is sufficient to allow a reasonable factfinder to decide that age was a determinative factor in Tanner's discharge.

IV

FUTURE DAMAGES

In its entry of judgment on the jury verdict, the trial court awarded Tanner $17,000 "as lost retirement and pension benefits accruing through normal retirement, in lieu of reinstatement." Rec., vol. II, at 477. On appeal, Prudential contends that an award of future damages is not authorized by the ADEA, and that even if such damages could be awarded, they were improper in this case because Tanner did not sincerely request reinstatement.

The ADEA incorporates the remedies of the Fair Labor Standards Act (FLSA) as follows:

> "The provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the FLSA], and subsection (c) of this section. . . . *Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. . . .*"

29 U.S.C. § 626(b) (emphasis added). The FLSA provides the district courts with power to restrain violations of the act. *Id.* § 217. The most pertinent provision, section 216(b), provides:

> "Any employer who violates the provisions of [the Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Id. § 216(b). However, the ADEA makes a significant addition to the FLSA remedies by providing that

> "In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."

Id. § 626(b) (emphasis added).

The courts disagree on whether future damages in lieu of reinstatement are available under the ADEA. *See, e.g., O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 547 F.Supp. 214, 216-19 N.D.GA.1982) (discussing cases); *Koyen v. Consolidated Edison Co.*, 560 F.Supp. 1161, 1167 & n. 33 (S.D.N.Y.1983) (citing cases). The Eighth and Ninth Circuits have held that such damages may be awarded under certain circumstances. *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier*, 672 F.2d at 1319. The First Circuit has stated that an ADEA plaintiff cannot recover damages for future economic loss. *See Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n. 4 (1st Cir.1982).

This court has recently reviewed a case in which the trial court had awarded future damages in lieu of reinstatement. *See Blim v. Western Electric Co.*, 731 F.2d 1473, 1478-79 (10th Cir.1984). We there recognized the split in the circuits on this issue, but a majority of the panel held that it did not need to resolve the question. *Id.* at 1479. Instead, the majority assumed without deciding that front pay is available under the ADEA, but held that under the circumstances of that case the trial court should have ordered repromotion rather than front pay.

Chief Judge Seth, in dissent, would have decided the issue and would have held that front pay is not a remedy contemplated by the ADEA. *Id.* at 1481. We are directly faced with the question in this case.

Although the ADEA provides that violations of the Act generally are to be treated as violations of the Fair Labor Standards Act, the ADEA only selectively incorporates FLSA sections. At the same time, as we have pointed out, the ADEA contains additional remedial provisions not found in the FLSA. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from these provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons,* 434 U.S. 575, 581 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978).

[8] In a thorough and careful analysis of the question of damages in lieu of reinstatement, the court in *Koyen* concluded:

> "The manifest purpose of this broad grant of legal and equitable power is to enable the courts to fashion whatever remedy is required to fully compensate an employee for the economic injury sustained by him. The power so granted is sufficient to authorize an award of future loss of earnings in appropriate cases. To deny that authority would defeat a purpose of the Act to make a victim of discrimination 'whole' and to restore him to the economic position he would have occupied but for the unlawful conduct of his employer. To deny such authority would remove a deterrent force against future violations."

560 F.Supp. at 1168 (footnotes omitted). We agree. The power to grant equitable relief provided in the ADEA clearly stands in addition to the monetary relief available under the FLSA sections and is expressly stated to be

without limitation. When we read this section as a whole and construe it liberally, as we must, *see Dartt*, 529 F.2d at 1260, we conclude that the legal and equitable remedies available under the ADEA are not limited either to those specifically listed or to those available under the FLSA, so long as the relief is "appropriate to effectuate the purposes of [the Act]." 29 U.S.C § 626(b).

[9] We held in *Blim* that reinstatement is the preferred remedy under the ADEA and should be ordered whenever it is appropriate. 731 F.2d at 1479; *see also Gibson*, 695 F.2d at 1101; *Cancellier*, 672 F.2d at 1319. Reinstatement may not be appropriate, however, when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible. *See, e.g., Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir.1983); *Cancellier*, 672 F.2d at 1319-20; *Whittlesey v. Union Carbide Corp.*, 567 F.Supp. 1320, 1330 (S.D.N.Y.1983); *Hoffman v. Nissan Motor Corp.*, 511 F.Supp. 352, 355 (D.N.H.1981). Under such circumstances, an award of future damages in lieu of reinstatement furthers the remedial purposes of the ADEA by assuring that the aggrieved party is returned as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct. *See Ventura v. Federal Life Insurance Co.*, 571 F.Supp. 48, 50 (N.D.Ill.1983). If this were not the case, an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return.[2] *See, e.g., Cancellier*, 672 F.2d at 1319-20.

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[2]A plaintiff need not "request reinstatement as a prerequisite to obtaining front pay where the evidence reveals an atmosphere of hostility." *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir.1980) (Title VII); *Koyen*, 560 F.Supp. at 1169.

We recognize that future damages have been criticized as uncertain and speculative. *See, e.g., Foit v. Suburban Bancorp,* 549 F.Supp. 264, 267 (D.Md.1982). However, given our conclusion that they are available under the ADEA, "[t]he mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability. 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' " *Koyen,* 560 F.Supp. at 1169 (quoting *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946)). Courts are able to alleviate the uncertainty of future damages by taking into account a discharged employee's duty to mitigate, "the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the emoloyee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards." *Id.* at 1168-69.

[10] In any event, uncertainty is not a relevant consideration in this case because the court did not grant future wages. Tanner's pension had vested at the time of trial and the parties stipulated that the $17,000 in pension benefits would provide Tanner the same pension upon retirement that he would have received had he not been illegally discharged.

[11] In its memorandum supporting its proposed judgment and order filed below, the EEOC stated:

> "Front pay is requested in lieu of reinstatement in that the defendant has steadfastly refused to consider reinstatement as a remedy since the date of receipt of Mr. Tanner's charge of discrimination. It has been two and one-half (2½) years since Mr.

> Tanner's discharge and defendant's expressed hostile attitude toward its former employees, both during conciliation attempts and at trial, makes reinstatement a virtual impossibility as a remedy."

Rec., vol. II, at 452. The record contains evidence to support this contention.[3] However, the district judge did not state why future damages are more appropriate than reinstatement. The trial court must make this assessment in the first instance. Accordingly, we remand for the court to reconsider its award of future pension benefits in light of our decision in *Blim* and the analysis set forth above, and to articulate the evidence and rationale underlying its decision.

V

THE WILLFULNESS INSTRUCTION

[12] The ADEA, 29 U.S.C. § 626(b), provides that amounts owing to a person as a result of a violation of the Act are deemed unpaid minimum wages or unpaid overtime compensation for purposes of section 216 of the FLSA. Under section 216, an employer who violates the FLSA is liable for these amounts plus "an additional equal amount as liquidated damages."[4] *Id.* § 216(b). How-

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[3]Indeed, Prudential has not indicated on appeal that it would prefer reinstatement over the payment of pension benefits.

[4]The ADEA authorizes the recovery of "liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses . . . that are 'too obscure and difficult of proof for estimate other than by liquidated damages. . . .' " H.R.Conf.Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S.Code Cong. & Ad.News 504, 528, 535 (quoting *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-84, 62 S.Ct. 1216, 1222-23, 86 L.Ed. 1682 (1942)). "[L]iquidated damages are in the nature

ever, the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." *Id.* § 626(b).

In this case the trial court instructed the jury that

> "A willful violation occurs whan a person acts with specific intent to violate the law, where with knowledge of the law he proceeds, or it proceeds to violate the law knowingly and intentionally.
>
> "In other words, you can find willful discrimination for age, or willful violation of the law, only if you find both that Prudential violated the law by discharging or reassigning complaining employees because of their age, and that Prudential knew, or should have known at the time that it decided to discharge or reassign the complaining employees, that such decisions and actions were in violation of the law and were intentionally and knowingly done in violation thereof."

Rec., vol. XV, at 1121-22. On appeal the EEOC contends that this instruction erroneously imposed too strict a standard by requiring proof that the employer specifically intended to violate the law. We agree.[5] The Supreme

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of legal relief," *id.*, and "are not intended to take the place of equitable relief." *Dickerson*, 703 F.2d at 280.

[5]Prudential argues that this issue is not properly before us because the EEOC did not propose to the trial court the instruction it now contends should have been given. Although the EEOC objected to the instruction given, the instruction it offered, while approved by several circuits, was not in the form articulated by this court. Even assuming that the EEOC failed properly to preserve the issue for appeal, however, we conclude that the instruction given constituted plain error affecting substantial rights. "[W]e will review instructions not properly objected to at trial where the error is plain and significant." *Fox v. Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir.1978).

Court recently considered the standard for ascertaining willful violations of the ADEA in *Trans World Airlines, Inc. v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). The Court specifically rejected the definition used by the district judge here by disagreeing with the argument that a violation is only willful when a defendant intends to violate the Act. *See id.* 624 n. 19.

The Court in *Thurston* adopted a "reckless disregard" standard of willfulness under which a violation is willful when " 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Id.* (quoting *Air Line Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir.1983)). This standard is elucidated by the Court's holding that a violation is not willful when the employer acts "reasonably and in good faith." *Id.* at 624 & n. 22.

[13] Our original opinion in this case was vacated by the Supreme Court and remanded for reconsideration in light of *Thurston*. The Court in *Thurston* specifically rejected the definition of willfulness used by this court in our earlier opinion and in the cases upon which we relied.[6] *See id.* Under our prior standard we held that the company was willful as a matter of law. Upon reconsideration of the record before us in light of the definition adopted in *Thurston*, we conclude that we cannot resolve the issue of willfulness as a matter of law. Accordingly, we remand so that this determination may be made by the finder of fact under the *Thurston* standard.

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[6] *See EEOC v. Prudential Federal Savings & Loan Ass'n*, 741 F.2d 1225, 1233-34 (10th Cir. 1984); *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1273, 1724 (10th Cir.1983); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir.1980); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972).

VI.

CONCLUSION

The judgment is affirmed insofar as it awards plaintiff $34,200 in lost wages. It is revised for improper jury instructions on the issue of liquidated damages, and the case is remanded for further proceedings in light of *Thurston.* The judgment is also reversed insofar as it awards plaintiff $17,000 in future pension and retirement benefits, and the case is remanded for reconsideration of this relief in light of this opinion.

BARRETT, Circuit Judge, dissenting in part:

I agree with the dissent filed by Chief Judge Seth in *Blim v. Western Elect. Co., Inc.,* 731 F.2d 1473 (10th Cir. 1984) that front pay is not a remedy contemplated by the ADEA. *See also, Kolb v. Goldring,* 694 F.2d 869 (1st Cir.1982).

Chief Judge Seth carefully reviewed the legislative history of ADEA and he concluded that "allowing front pay runs against the intent of Congress in limiting legal remedies to 'unpaid wages and unpaid overtime compensation.' The court should not use its equitable powers to frustrate the intent of the statute." 731 F.2d at 1481. Judge Seth set forth salutary reasons for the disallowance of front pay, after recognizing that liquidated damages may be recovered for willful violations:

> The front pay damages are too uncertain to be considered "lost wages" or "lost earned benefits." The possibilities of promotions, legitimate demotions, terminations, or death inject too many unknowns. In these circumstances the award of front pay is too speculative to be considered pecuniary damages under the statute. The enforcement section of the ADEA was specifically constructed to limit the

> type of available damages. As mentioned, although the statute grants broad equitable powers those powers cannot be used to expand the legal remedies specifically detailed in the statute. *Id.* at 1481.

In *Plyler v. Doe,* 457 U.S. 202, 242, 102 S.Ct. 2382, 2408, 72 L.Ed.2d 786 (1982) the Supreme Court observed that "[T]he Constitution does not constitute us [the Justices of the Supreme Court of the United States] as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' " In like manner the court should be ever cautious not to play the role of a superlegislature.

(3)

No. 85-343

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury in an action brought under the Age Discrimination in Employment Act (ADEA) must be instructed that the plaintiff has the burden of proving that the employer's explanation for its employment decision is a pretext, although the jury was instructed that the plaintiff had the burden of showing that the age of the employee in question was a "determinative factor" in the decision to discharge him.

2. Whether the court of appeals erred in holding erroneous a jury instruction that required a finding of specific intent to violate the ADEA for an award of double damages, and in remanding the case to allow the finder of fact to determine whether double damages were appropriate under the standard set forth by this Court in *Trans World Airlines, Inc.* v. *Thurston,* No. 83-997 (Jan. 8, 1985).

3. Whether an award of future damages in lieu of reinstatement is available under the ADEA.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-343

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24a-41a) is reported at 763 F.2d 1166. The prior opinion of the court of appeals (Pet. App. 1a-19a), which was vacated by this Court on January 14, 1985, is reported at 741 F.2d 1225. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1985. A petition for a writ of certiorari was filed on August 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Employment Opportunity Commission (EEOC) brought this action alleging that the petitioner, Prudential Federal Savings and Loan Association (Prudential), violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, by discharging or demoting several employees because of their age. Prudential argued that the discharges were part of a general reduction in force necessitated by an economic downturn. The case was tried to a jury, which was instructed that the Commission had the burden of proving that "the age of the employee in question was a *determinative factor* in defendant's decision to discharge him. That is . . . *but for* his age, he would not have been so treated" (Pet. App. 29a; emphasis added). The jury returned a verdict finding liability with regard to one former employee, Douglas Tanner.[1]

The jury awarded Tanner $34,200 in past lost wages and benefits (Pet. App. 24a). However, the jury declined to award double damages under 29 U.S.C. 216, which provides for such awards "in cases of willful violations." The jury had been instructed that a willful violation occurs only if there is specific intent to violate the Act.[2] The district

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[1]The EEOC's complaint was brought on behalf of six other individuals as well. The jury found that they had suffered no discrimination, and the Commission did not challenge that determination on appeal (Pet. App. 24a n.1).

[2]The district court's instruction stated, in relevant part:

> A willful violation occurs when a person acts *with specific intent to violate the law,* where with knowledge of the law he proceeds, or it proceeds, to violate the law *knowingly and intentionally*.
>
> In other words, you can find willful discrimination for age, or willful violation of the law, *only if you find* both that Prudential violated the law by discharging or reassigning complaining employees because of their age, and *that Prudential knew, or should have known* at the time that it decided to discharge or

court entered judgment on the jury's verdict. It also awarded future damages of $17,000 to compensate Tanner for "lost retirement and pension benefits accruing through normal retirement" in lieu of reinstatement (Pet. App. 24a).

Both parties appealed. The EEOC challenged the district court's jury instructions regarding the standard for awarding double damages, arguing that the district court erred in instructing the jury that the EEOC had to show that petitioner specifically intended to violate the Act. Petitioner challenged, inter alia, the district court's instructions on the standard for proving age discrimination and its award of future damages. On the liability issue, petitioner complained that the district court had refused to give an instruction stating that the EEOC had the burden of proving that its business reasons for firing Tanner were a mere pretext for age discrimination. On the future damages issue, petitioner argued that, while the district court could order Tanner reinstated, it could not award any future damages in lieu of reinstatement.

2. The court of appeals affirmed the finding of liability. The court rejected petitioner's challenge to the jury instructions after concluding that, viewed as a whole, the instructions "accurately set out the relevant legal standards" (Pet. App. 7a). The court of appeals concluded that the instruction requested by the petitioner—that the EEOC must prove that petitioner's explanation for the discharge was a pretext for discrimination—"could have misled the jury into thinking that even though [it] found age to be the determinative factor, it nonetheless would be required to return a verdict for Prudential unless the EEOC also proved

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reassign the complaining employees, *that such decisions* and actions *were in violation of the law and were intentionally and knowingly done in violation thereof.*

Pet. App. 38a; emphasis added.

that Prudential's reasons were invalid" (*ibid.*). The court noted that such an understanding of the standard of proof would be mistaken since "a plaintiff need not prove that the reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference" (*ibid.*).

Concerning double damages, the court of appeals agreed with the EEOC that the district court "erroneously imposed too strict a standard by requiring proof that the employer specifically intended to violate the law" (Pet. App. 15a). Instead, the court held that a violation is willful "when the employer 'acted in the face of the ADEA' and was 'fully aware that the Act was 'in the picture' " (*id.* at 16a, quoting *Mistretta* v. *Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980)). As there was uncontested evidence that petitioner was aware of the Act's applicability to its employees, the court held as a matter of law that the violation was willful and that Tanner was therefore entitled to double damages (Pet. App. 17a).

With respect to the district court's award of future pension benefits in lieu of reinstatement, the court determined that, while reinstatement is the preferred remedy, future damages can be awarded where reinstatement is impossible as a practical matter because the employer has exhibited extreme hostility toward the individual (Pet. App. 12a-13a). The court noted that an award for future damages may be necessary to achieve the ADEA's "make whole" purposes and to prevent employers from frustrating its aims (*ibid.*). Although there was evidence showing that petitioner's hostile attitude precluded reinstatement of Tanner (*id.* at 14a), the court nonetheless directed the district court on remand to reconsider its award of future damages, and "to articulate the evidence and rationale underlying its decision" (*ibid.*). Judge Barrett dissented from the determination that future damages can be awarded under the ADEA, concluding

instead that such damages are too speculative (*id.* at 18a-19a).

3. Prudential petitioned for a writ of certiorari, challenging the award of double damages and the court of appeals' holding that an award of future damages in lieu of reinstatement is authorized under the ADEA. The EEOC suggested that the Court hold the petition because the question of the standard for awarding double damages was then before the Court in *Trans World Airlines, Inc.* v. *Thurston (TWA),* No. 83-997 (Jan. 8, 1985). The EEOC opposed review of the other issues raised by Prudential.

On January 8, 1985, this Court issued its opinion in *TWA*. The Court concluded that a plaintiff is not required to show that a defendant "intended to violate the Act" in order to obtain double damages (slip op. 13 n.19). On the other hand, a plaintiff has to show more than that the defendant "knew that the ADEA was 'in the picture' " (slip op. 14-15). Rather, the Court concluded that the correct standard is whether the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (slip op. 13-14). Shortly after issuing the *TWA* decision, the Court granted the petition for a writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded for further consideration in light of *TWA*.

On remand, the court of appeals issued an opinion identical to its earlier opinion, except with respect to the double damages issue. On that issue, the court reiterated its prior conclusion that the district court's instruction had erroneously required proof of specific intent to violate the law (Pet. App. 38a). The court of appeals noted that in *TWA* this "Court specifically rejected the definition used by the district judge here by disagreeing with the argument that a violation is only willful when a defendant intends to violate

the Act" (Pet. App. 39a; citations omitted). The court of appeals recognized that the Court in *TWA* also rejected its own earlier formulation of the definition of willfulness, which focused on whether Prudential knew that the ADEA was "in the picture" (Pet. App. 39a). The court concluded after reconsideration of the record that it was unable to determine as a matter of law whether the violation here was willful in light of the "reckless disregard" standard adopted in *TWA*. Consequently, it remanded the case so that this determination could be made by the finder of fact in the first instance (*ibid.*).

ARGUMENT

1. Petitioner challenges (Pet. 5-7) the court of appeals' conclusion that it was not necessary to instruct the jury that it had to find for petitioner unless it found that petitioner's explanation for discharging Tanner was a mere pretext.[3] The court of appeals correctly held that the instruction given by the district court properly and clearly put the central issue directly before the jury for its determination: whether the EEOC had proved by a proponderance of the evidence that Tanner was discharged because of his age. Review by this Court is unwarranted because neither *TWA* nor any other decision of any court requires that a jury in an ADEA action be instructed that it make specific findings in accord with the paradigm for the shifting of burdens of production and the burden of proof established by *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973).

TWA, which nowhere addresses jury instructions, does not support petitioner's contention. Indeed, the Court reiterated that it is not appropriate to apply inflexibly the *McDonnell Douglas* analysis to every discrimination case

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[3]Although petitioner now contends that the issue warrants review, petitioner failed to challenge the instruction in its prior petition for a writ of certiorari.

(slip op. 8-9). See also *United States Postal Service* v. *Aikens,* 460 U.S. 711, 714 (1983) (framing issue in *McDonnell Douglas* terms after case was fully tried on the merits "unnecessarily evade[s] the ultimate question of discrimination *vel non*"); *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978) (prima facie case method "never intended to be rigid, mechanized or ritualistic"). Petitioner's error lies in confusing the relationship between the Title VII paradigm for proving discrimination by circumstantial evidence and appropriate ADEA jury instructions. The Title VII proof scheme, which facilitates the orderly development and assessment of evidence in a bench trial, directly transposes into principles controlling the court's grant or denial of a directed verdict or of a judgment notwithstanding the verdict in an ADEA action tried to a jury. The Title VII scheme also provides the court in an ADEA jury trial with guidelines so that its charge to the jury properly identifies the factual determinations to be made. The judicially created presumptions, inferences, and evidence production burdens of Title VII do not, however, directly transpose into jury instructions in ADEA actions. See generally *Lovelace* v. *Sherwin-Williams Co.,* 681 F.2d 230 (4th Cir. 1982).

Contrary to petitioner's assertion (Pet. 6), the First Circuit, which specifically and at length addressed the question of proper jury instructions in an ADEA action, did not require a pretext instruction in every discrimination case. Rather, the court explained that the trial judge "should not force a case into a *McDonnell Douglas* format if to do so will merely divert the jury from the real issues * * *. [T]he best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age—with adequate explanation of * * * the determinative role age must have played * * *." *Loeb* v. *Textron, Inc.,* 600 F.2d 1003, 1018 (1st Cir. 1979). Accord *Blackwell* v. *Sun Electric Corp.,* 696 F.2d 1176,

1179 (6th Cir. 1983) (district court did not err in refusing to instruct jury that the employer's explanation for plaintiff's discharge dispelled the inference of discrimination unless the jury found the proferred reason to be a pretext); see also *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 130 (2d Cir. 1981) ("it may not necessarily be helpful to bring [the *McDonnell Douglas* test] to the attention of the jury"); *Laugesen* v. *Anaconda*, 510 F.2d 307, 312 (6th Cir. 1975) (the *McDonnell Douglas* test does not "deal with the problems and procedures inherent in the submission of issues to the jury").

The charge here when read in its entirety accurately instructed the jury, in accord with the decisions of every court that has considered the issue, that to hold petitioner liable it had to find that the EEOC proved by a preponderance of the evidence that "the age of the employee in question was a determinative factor" in petitioner's discharge decision, that is, "but for" age the discharge would not have occurred (Pet. App. 29a). See *Perrel* v. *Finance America Corp.*, 726 F.2d 654, 656 (10th Cir. 1984); *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 915-916 (3d Cir. 1983); *Pena* v. *Brattleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983); *Cuddy* v. *Carmen*, 694 F.2d 853, 857-858 (D.C. Cir. 1982); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1111-1112 (4th Cir. 1981); *Kelly* v. *American Standard Inc.*, 640 F.2d 974, 984 (9th Cir. 1981); *Loeb* v. *Textron, Inc.*, 600 F.2d at 1019-1020.[4]

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[4]Petitioner baldly asserts (Pet. 7) that refusing to give its proposed pretext instruction misled the jury "into believing that an employer has the burden of not only articulating but of proving a nondiscriminatory explanation for its discharge." However, the instructions given made clear that the burden of proof was on the the EEOC with regard to each and every essential element of its claim (Tr. 1106) and that the jury was "not * * * to sit in judgment of the business decisions made by Prudential" (Tr. 1109). The jury verdict, which found for petitioner with regard to six of the seven employees whom EEOC sought to prove were victims of age discrimination, refutes any contention that the jury was misled.

Moreover, the courts below were correct in concluding that insertion of the pretext instruction in the charge that was given to the jury would likely have confused the jury and distracted it from the ultimate question before it for determination (Pet. App. 30a). As this Court explained in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), "[t]he use of the term 'pretext' * * * does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race * * *[;] no more is required to be shown than that race was a 'but for' cause." *Id.* at 282 n.10. Giving the pretext instruction could well have misled the jury into believing that it had to find that age was the sole cause of Tanner's discharge.

2. Nor is there merit to petitioner's claim (Pet. 8-15) that the double damages issue warrants review. The court of appeals on remand correctly held that the district court's instruction on double damages was erroneous in light of this Court's decision in *TWA*, and further review of the instruction is unwarranted, particularly in light of the comprehensive discussion of the correct standard in *TWA*. The court of appeals' conclusion that it was unable to determine as a matter of law whether double damages should be awarded under the *TWA* standard and its remand of the issue were also correct. Petitioner challenges this holding on factual grounds that do not merit review by this Court.

a. In *TWA*, this Court held that a violation is willful so as to warrant double damages "if the employer * * * knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (slip op. 13-14, quoting *Air Line Pilots Ass'n* v. *Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983)). In so holding, the Court made clear that it "d[id] not agree with [the] argument that unless [an employer] intended to violate the Act, double damages are inappropriate under section 7(b) of the ADEA" (slip op.

13 n.19). In this case, the trial court explicitly instructed the jury that for the violation to be willful, it would have to find that petitioner "act[ed] with specific intent to violate the law" (see Pet. App. 38a). As the court of appeals held, in *TWA* this Court "specifically rejected the definition used by the district judge * * * by disagreeing with the argument that a violation is only willful when a defendant intends to violate the Act" (Pet. App. 39a; citation omitted).

In arguing that the district court's willfulness definition "encompasses the purpose and thrust of the ADEA as interpreted in *TWA*" (Pet. 9), petitioner ignores the explicit instruction requiring proof of specific intent (see note 2, *supra*) and this Court's rejection of that standard. While the description of the "reckless disregard" standard as "an acceptable * * * definition" (slip op. 16) implies the possibility of permissible alternatives, the instruction given in the case is clearly unsatisfactory.[5]

b. Having correctly concluded that both the district court's "specific intent" test and its own "in the picture" test had been rejected, the court of appeals proceeded to reexamine the violation here under the standard set forth in *TWA*. Although both parties argued, albeit with opposing conclusions, that a determination could be made by the court of appeals on remand, the court determined that it could not resolve the willfulness issue as a matter of law and remanded the issue for a factual determination.[6] Petitioner

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[5]Although petitioner now argues that the instruction permitted a finding of willfulness for reckless actions, petitioner argued in its previous petition for a writ of certiorari that the instruction properly required proof of specific intent to violate the ADEA. See No. 84-681 Petition at 5-8.

[6]The EEOC stated in its brief on remand that if the appellate court determined that the record is insufficient from which to conclude that Prudential acted in reckless disregard of the ADEA's prohibitions, the case should be remanded for a new trial on that issue.

argues that this ruling should be reviewed "to clarify the standards surrounding the good faith defense set forth in *TWA* v. *Thurston*" (Pet. 15). The *TWA* standard needs no clarification at this time. It would be particularly inappropriate to reexamine the standard in a case, such as this, in which neither party tried the issue of willfulness with the *TWA* standard in mind and no lower court has yet ruled on whether the standard was satisfied.

Furthermore, contrary to petitioner's assertions (Pet. 10-11), there are grounds on which the trier of fact could conclude that petitioner "knew or showed reckless disregard" for whether its discharge of Tanner was prohibited by the ADEA. Although petitioner relies heavily on its evidence that Tanner was discharged for business reasons unrelated to age (Pet. 14), the jury disbelieved the company and found that Tanner's age was the determinative factor in the discharge. Similarly, petitioner relies only on its evidence regarding its reduction in force, in particular its directions to managers to comply with the ADEA (Pet. 10-11, 13), disregarding the EEOC's evidence of statements by Prudential's president and other officials "which the jury reasonably could construe as suggesting that age played a determinative role in the company's selection of employees for termination" (Pet. App. 31a) and statistical evidence showing a significant correlation between age and discharge during the reduction in force.[7] There is thus at a minimum sufficient evidence tending to show that petitioner acted in reckless disregard of the requirements of the ADEA when it

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[7]While this evidence was presented as proof of petitioner's liability, petitioner concedes that "a proper and fair determination of willfulness must necessarily be based on the same jury finding that there was an intentional violation of the ADEA based on complete development of the facts and circumstances of the case" (Pet. 11-12 n.4; citation omitted).

discharged Tanner to preclude a ruling that petitioner's violation was not willful as a matter of law under the *TWA* standard.[8]

3. The court of appeals' conclusion that future damages can be awarded in lieu of reinstatement in appropriate circumstances under the ADEA does not merit further review.[9] As an initial matter, the court of appeals remanded the future damages issue to the district court to determine whether the facts here justify a future damages award and to set forth the evidence and rationale supporting its determination (Pet. App. 37a). Thus, as no decision to award future damages has been made by the courts below in this case, review by this Court would be premature.

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[8]The context in which the violation here occurred and petitioner's attitude regarding the ADEA stand in marked contrast to the analogous facts in *TWA*. The violation in *TWA*—restrictions on down-bidding procedures for age-based transfers that did not apply to nonage-based transfers—was but a subsidiary issue in a more complex legal problem that arose when changes in the law required the modification of TWA's personnel practices in ways not contemplated under an operative collective bargaining agreement and which, moreover, had previously been immunized from the ADEA's reach. As this Court stated, TWA's violation occurred because it "[a]pparently * * * failed to focus specifically * * * [and] simply overlooked the challenged aspect of the new plan" in its attempt to comply with the complexities of a changing statute (slip op. 17). In contrast, petitioner's violation—discharging an employee because of his age—did not arise as an unforeseen and tangential consequence of attempting to comply with developing law, but rather went directly to the core purpose and prohibition of the ADEA as originally enacted. Unlike TWA, petitioner presented no evidence that it relied on legal advice prior to, or during, its reduction in force. In any event, petitioner was faced with no overriding legal complexities obscuring the basic prohibition of the ADEA forbidding discharge of older workers because of their age.

[9]Contrary to petitioner's implication (Pet. 15), this Court did not single out the issue of future damages for reconsideration when it vacated the opinion below and remanded the case for reconsideration in light of *TWA*. Since *TWA* did not involve the issue, the court of appeals properly reinstated its prior opinion on this point without change.

Contrary to petitioner's assertion (Pet. 15-20), the circuits are not in conflict on the issue of whether future damages may be awarded under the ADEA. The Second, Sixth, Eighth, Ninth, and Eleventh Circuits agree with the Tenth Circuit that where reinstatement is inappropriate future damages can be awarded under the remedial provisions of the ADEA. *O'Donnell* v. *Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984); *Davis* v. *Combustion Engineering Inc.*, 742 F.2d 916, 922-923 (6th Cir. 1984); *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 727-728 (2d Cir. 1984); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier* v. *Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), 459 U.S. 859 (1982). Petitioner's claim of conflict (Pet. 16) is based entirely on dicta in a footnote in a decision of the First Circuit. See *Kolb* v. *Goldring*, 694 F.2d 869, 874-875 n.4 (1st Cir. 1982). Five days after this petition was filed, however, the First Circuit made clear that future damages may be awarded under the ADEA. *Wildman* v. *Lerner Stores Corp.*, No. 84-1394 (Aug. 28, 1985). After reviewing the decisions of the other courts of appeals, including this case (slip op. 21-23), the court held that, while "[f]uture damages should not be awarded unless reinstatement is impracticable or impossible," the ADEA gives courts "discretion to award front pay" (*id.* at 24). Thus, there is no conflict.

Furthermore, the courts of appeals are correct in holding that future damages are available as an equitable remedy under the ADEA. Petitioner contends that future damages are precluded under the ADEA because the remedial provisions of the Act incorporate parts of the Fair

Labor Standards Act (FLSA).[10] Petitioner argues that because future damages are not available under the incorporated sections of the FLSA they cannot be awarded under the ADEA. Petitioner's argument misses the point. Future damages are not awarded under the FLSA remedies incorporated into the ADEA, but are awarded as equitable relief in lieu of reinstatement under a provision of the ADEA that expressly provides the courts authority "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. 626(b). The court of appeals in this case correctly held that if reinstatement is not practicable because of hostility between the parties, future damages may be awarded in lieu of reinstatement. Such an award is fully consistent with Congress's intent that victims of age discrimination be made as fully whole as possible. See *Whittlesey,* 742 F.2d at 728; *Gibson,* 695 F.2d at 1097; *Rodriquez* v. *Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

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[10]The ADEA provides, in part, that it is to be "enforced in accordance with the powers, remedies and procedures of Sections 211(b), 216 (except for subsection (a) thereof) and 217 of [the FLSA]," and further provides that "amounts owing" to a victim of age discrimination "shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purpose of section 216 and 217 of [the FLSA]." 29 U.S.C. 626(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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